

Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human Rights

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Introduction

On 29 November 2009, 58 % of Swiss voters (with a turnout of 54 %) approved a popular initiative for a constitutional ban on the construction of minarets.¹ The outcome of the vote attracted attention from all over the world and was widely condemned, not least by the UN Human Rights Council and the Parliamentary Assembly of the Council of Europe, as a discriminatory measure in violation of the right to freedom of religion.² Almost exactly a year later, on 28 November 2010, a 53 % majority of voters backed a proposal for a new constitutional provision requiring the automatic expulsion of foreign nationals convicted of certain criminal offences specified by law, including benefit fraud.³ Prior to the vote, the Federal Council (the federal government) had warned that the new provision would be incompatible with a number of human rights, in particular the right to private and family life, guaranteed by the Swiss Federal Constitution as well as international treaties ratified by Switzerland such as the European Convention on Human Rights 1950 (ECHR), the International Covenant on Civil and Political Rights 1966 (ICCPR), and the Convention on the Rights of the Child 1989.⁴

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¹ Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 29. November 2009, Bundesblatt 2010 3437 at 3440. See Langer, 'Panacea or Pathetic Fallacy? The Swiss Ban on Minarets' (2010) 43 *Vanderbilt Journal of Transnational Law* 863.

² Human Rights Council Res 13/16, 25 March 2010, A/HRC/RES/13/16 at para. 8; and PACE Res 1743 (2010) at para. 13.

³ Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 28. November 2010, Bundesblatt 2011 2771 at 2773.

⁴ Botschaft zur Volksinitiative "für die Ausschaffung krimineller Ausländer (Ausschaffungsinitiative)", Bundesblatt 2009, 5097 at 5106-13. Switzerland ratified the ECHR on 28 November 1974, the ICCPR on 18 June 1992, and the Convention on the Rights of the Child on 24 February 1997.

These two popular initiatives were only the latest in a series of proposals that conflict with human rights guarantees. In 2004, Swiss voters passed an initiative requiring the lifelong detention of dangerous sexual and violent offenders, a requirement that is, to put it mildly, difficult to reconcile with the right to regular judicial review guaranteed by Article 5(4) of the ECHR.⁵ In 2008, in contrast, a majority of voters rejected a proposed constitutional amendment that would have allowed for naturalisation decisions to be taken by popular vote.⁶ The amendment would have amounted to a violation of procedural guarantees of the Federal Constitution and the right to an effective remedy guaranteed by Article 13 of the ECHR, Article 2(3) of the ICCPR, and Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination 1966.⁷

These recent popular initiatives have triggered a major debate in Switzerland as to the appropriate relationship between direct democracy and human rights. Simply stated, this debate opposes, on the one hand, those who depict the people as the absolute sovereign on whose will, finding its expression in direct democratic processes, no limits can be imposed with, on the other hand, those who argue that in a state based on the rule of law, even the people must comply with certain fundamental rules, including respect for human rights, and that courts can review expressions of the popular will for compliance with these rules. The debate is not only being fought out in legal scholarship but has also led to a wide range of concrete policy proposals from a variety of actors. The purpose of this article is twofold. First, to discuss the current legal framework regulating the relationship between direct democratic instruments (especially the popular initiative) and human rights, and, second, to present and assess the most important proposals for reforming that framework.

1 The Swiss system of (semi-)direct democracy

The political system of Switzerland is often described as a ‘semi-direct democracy’ as it combines elements of representative democracy (in the form of an elected parliament

⁵ Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 8. Februar 2004, Bundesblatt 2004 2199; Botschaft zur Volksinitiative “Lebenslange Verwahrung für nicht therapierbare, extrem gefährliche Sexual- und Gewaltstraftäter“, Bundesblatt 2001 3433 at 3455-6.

⁶ Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 1. Juni 2008, Bundesblatt 2008 6161.

⁷ Botschaft zur Eidgenössischen Volksinitiative “für demokratische Einbürgerungen“, Bundesblatt 2006 8953 at 8959-66. Switzerland ratified the International Convention on the Elimination of All Forms of Racial Discrimination on 29 November 1994.

authorised to pass legislation) with direct democratic mechanisms.⁸ Since all major political parties are represented on the Federal Council, such mechanisms allowing the people to directly participate in political processes provide an essential corrective to the lack of a strong opposition. The direct democratic mechanisms existing at the federal level include the mandatory referendum, the optional referendum, and the popular initiative.

Amendments to the Federal Constitution as well as accession to organisations for collective security and supranational organisations are subject to a mandatory referendum.⁹ They need to be approved by both the majority of those voting and the majority of cantons,¹⁰ the vote of the latter being determined by the result of the popular vote in the respective canton.¹¹ Federal acts passed by the Federal Assembly (the federal parliament) and parliamentary approval of important international treaties are subject to an optional referendum, meaning that either 50,000 persons eligible to vote or eight cantons may ask for them to be put to a vote.¹² In case of a vote, a majority of voters is sufficient for these kinds of measures to be approved.¹³

Most importantly for the present context, the popular initiative gives 100,000 persons eligible to vote the right to propose a complete or partial revision of the Federal Constitution.¹⁴ The right to propose a partial revision of the constitution was not introduced until 1891, more than 40 years after the creation of modern Switzerland as a federal state in 1848. The number of signatories required to launch a popular initiative was only raised once, from 50,000 to 100,000 in 1977, not least as a reaction to the introduction of women's suffrage in 1971.¹⁵ Today, that number equals slightly less than 2 % of the over 5 million citizens who are eligible to vote (out of a total population of 7.8 million). Despite this low

⁸ Linder, 'Direct Democracy', in Klöti et al (eds), *Handbook of Swiss Politics* (Zürich: Neue Zürcher Zeitung Publishing, 2007) 101 at 108-10.

⁹ Article 140(1) Swiss Federal Constitution. An English version of the Swiss Federal Constitution is available on the website of the Swiss Confederation at: <http://www.admin.ch/ch/e/rs/c101.html> [last accessed 12 September 2011].

¹⁰ Articles 140(1) and 142(2) Federal Constitution.

¹¹ Article 142(3) Federal Constitution.

¹² Article 141(1) Federal Constitution. With a few exceptions, all treaties need to be approved by the Federal Assembly. See Articles 166(2) and 184(2) Federal Constitution. Parliamentary approval of a treaty is not the same as ratification: Whereas the former is a purely domestic process, the latter is an international act, consisting of the exchange or deposit of the instruments of ratification. See, for example, Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2010) at 60.

¹³ Articles 141(1) and 142(1) Federal Constitution.

¹⁴ Articles 138 and 139 Federal Constitution.

¹⁵ Botschaft des Bundesrates an die Bundesversammlung über eine Erhöhung der Unterschriftenzahlen für Initiative und Referendum vom 9. Juni 1975, Bundesblatt 1975 II 129 at 131 and 138.

percentage requirement, after a marked increase of popular initiatives in the 1970s, the frequency with which this instrument is used has been relatively stable. On average, four initiatives are submitted a year.¹⁶

Any measure that can be formulated as a constitutional norm may be proposed by way of a popular initiative. This may include proposals that would entail radical changes to the political system of Switzerland, such as abolition of the armed forces¹⁷ or accession to the European Union.¹⁸ Thus, ‘the popular initiative enlarges the realm of the politically thinkable and feasible.’¹⁹ Apart from the very limited reasons for declaring popular initiatives invalid discussed in Section 3 below, they must be put to the vote in their original wording. The only way in which the Federal Assembly can react to an initiative is to issue a recommendation to voters on how to vote and, if it deems appropriate, to draft a counter-proposal.²⁰ Popular initiatives need to be approved by the double majority of voters and cantons.²¹ Only 18 out of the 175 initiatives voted on so far have managed to pass this hurdle.²² Nevertheless, even if not approved, a popular initiative may have a significant indirect impact, putting issues on the political agenda or triggering legislative changes.

2 Direct democracy and the human rights of minorities

Decision-making in parliament is characterised by mechanisms of deliberation (such as commission meetings and expert hearings), bargaining processes promoting compromise, and further safeguards (such as public voting) that tend to protect the interests of minorities. Since these mediating mechanisms and safeguards are absent in popular votes, it is often assumed that minorities fare worse in a system of direct democracy as compared to that of a representative democracy. That direct democracy may lend itself to tyranny of the majority was, of course, already present in the minds of the founding fathers of the United States. James Madison maintained that with direct participation of citizens in government decision-making, ‘measures are too often decided, not according to the rule of justice and the rights

¹⁶ The relevant figures are available on the website of the Federal Chancellery at: http://www.admin.ch/ch/d/pore/vr/vor_2_2_6_3.html [last accessed 12 September 2011].

¹⁷ In 1989 and 2001 initiatives to abolish the Swiss army were rejected.

¹⁸ In 2001 a proposal to enter into negotiations on acceding to the European Union was rejected.

¹⁹ Linder, *supra* n 8 at 117.

²⁰ Article 139(5) Federal Constitution.

²¹ Articles 139(5) and 142(2) Federal Constitution.

²² The statistics are available on the website of the Federal Chancellery at: http://www.admin.ch/ch/d/pore/vi/vis_2_2_5_9.html [last accessed 12 September 2011].

of the minor party but by the superior force of an interested and overbearing majority'²³ and that, therefore, '[i]t is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.'²⁴

Empirical work testing that assumption is surprisingly sparse and limited to Switzerland and the US states, those parts of the world where by far the largest share of popular votes takes place. In what was probably the first systematic analysis, in 1997, Barbara Gamble looked at US state and local votes on initiatives and referenda concerning civil rights legislation and found that the interests of minority groups were on the losing side in 78 % of cases.²⁵ Another study conducted in California concluded that, in general, 'there is little overall anti-minority bias in the system of direct democracy', but that when proposals explicitly targeted racial and ethnic minorities, these minorities – and Latinos in particular – lost regularly.²⁶ In contrast, in the first – and for a long time only – empirical Swiss study, Bruno Frey and Lorenz Goette analysed a number of federal, cantonal, and municipal votes and found that in only 30 % of them the result could be said to be directed against minority groups.²⁷

Measuring the effects of direct democracy on the rights of minorities is a complex task, so that the results of these and similar early studies need to be approached with caution. First, none of these studies are really comprehensive but instead rely on very limited samples that are not always properly explained. Second, they do not account for the fact that not all popular votes are equally important to the minority groups concerned. Third, they generally do not attempt to distinguish between different minorities according to their political leverage, degree of social integration, and so on. Fourth, they often fail to provide an adequate comparison of their results to what would be the outcome in a system of representative democracy. This led John Matsusaka to conclude in 2005 that

²³ Federalist Papers No 10. The Federalist Papers are available on the website of the Library of Congress at: <http://thomas.loc.gov/home/histdox/fedpapers.html> [last accessed 12 September 2011].

²⁴ Ibid. at No 51.

²⁵ Gamble, 'Putting Civil Rights to a Popular Vote' (1997) 41 *American Journal of Political Science* 245.

²⁶ Hajnal, Gerber, and Louch, 'Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections' (2002) 64 *Journal of Politics* 154 at 174.

²⁷ Frey and Goette, 'Does the Popular Vote Destroy Civil Rights?' (1998) 42 *American Journal of Political Science* 1343.

‘[u]nfortunately, there is little rigorous empirical work on this issue, and the work that does exist rests on flawed methodologies.’²⁸

Since then, however, a US study that replicates and extends previous research and directly compares outcomes of direct democratic processes to those in representative democracy has confirmed that, at least as far as the rights of homosexuals are concerned, this particular minority is in fact more likely to lose in direct democratic contests.²⁹ Most importantly for our purposes, in 2010, Adrian Vatter and Deniz Danaci undertook a comprehensive analysis of all 193 popular votes affecting the interests of minorities that took place in Switzerland at the federal and cantonal levels from 1960 to 2007. They found that, as a general tendency, minorities fare worse in popular votes as compared to those in representative institutions.³⁰ However, there are very important differences between the various minority groups. For example, the interests of homosexuals and disabled people are equally well protected in direct democratic processes as in parliament. Other groups, such as linguistic minorities, fare only slightly worse in direct democracy. Finally, popular votes have a significant negative impact for religious minorities (especially non-Christian communities)³¹ and, in particular, foreign nationals – all recent referenda intended to prevent the tightening of immigration laws, for example, have failed. Thus, the authors conclude, it is especially one particular type of minority group that loses out in direct democratic processes, namely those that sociology describes as ‘outgroups’: those that are perceived as ‘alien’ and not well integrated into society.³²

This finding is certainly confirmed by the experience made with the direct democratic instrument that is the focus of this article: the popular initiative at the federal level. Already the first popular initiative ever submitted was aimed at restricting the freedom of religion of an ‘outgroup’, the Jews. In 1893, the majority of voters accepted a new constitutional provision prohibiting kosher butchering.³³ Although there were several further initiatives

²⁸ Matsusaka, ‘The Eclipse of Legislatures: Direct Democracy in the 21st Century’ (2005) 124 *Public Choice* 157 at 168.

²⁹ Haider-Markel, Querze, and Lindaman, ‘Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights’ (2007) 60 *Political Research Quarterly* 304.

³⁰ Vatter and Danaci, ‘Mehrheitstyannei durch Volksentscheide? Zum Spannungsverhältnis zwischen direkter Demokratie und Minderheitenschutz’ (2010) 51 *Politische Vierteljahresschrift* 205 at 211.

³¹ See also Vatter (ed.), *Vom Schächt- zum Minarettverbot: Religiöse Minderheiten in der direkten Demokratie* (Zürich: Verlag Neue Zürcher Zeitung, 2011).

³² Vatter and Danaci, *supra* n 30 at 212-3.

³³ Bundesblatt 1893 IV 401. See Bolliger, ‘Die eidgenössische Volksabstimmung über das Schächtverbot von 1893’, in Vatter (ed.), *supra* n 31 at 70.

targeting unpopular minorities in the twentieth century, most importantly a series of proposals to restrict immigration in the 1970s, all were rejected. However, in more recent years, initiatives aimed at restricting the human rights of unpopular groups have again been attracting majority support. As explained above, since 2004 there have been votes on (at least) four such initiatives, three of which were passed. The lifelong detention initiative targeted a group that is particularly stigmatised by society: sexual and violent offenders. The minarets initiative restricted the freedom of religion of the Muslim community, an archetypical ‘outgroup’ in Switzerland – not only are Muslims members of a non-Christian religious minority but also are 88 % of them foreign nationals.³⁴ Finally, the expulsion initiative was directed against those described as ‘the worst of the worst’: those who lack Swiss citizenship and, in addition, have allegedly demonstrated their inability to integrate into society by committing a crime.

While it is difficult to pinpoint the exact reasons for this recent trend, two factors seem to have played an important role. First, over the last two decades, the right-wing Swiss People’s Party, which supported all four popular initiatives referred to above, has transformed itself into the best-organised (and best-funded) Swiss political party and has, accordingly, considerably grown in strength, becoming the strongest party in 2003.³⁵ Second, political parties – the Swiss People’s Party foremost among them – have increasingly started to use the popular initiative as a campaigning instrument to attract the attention of the media and the public, especially in view of upcoming elections.³⁶ Proposals that challenge established rule-of-law principles and target the rights of unpopular minority groups, thus giving voters the opportunity to give expression to their discontent with the established system and vague fears, may be a particularly promising instrument for such symbolic politics. From this perspective, it is not surprising that the majority of those who approved the minarets ban indicated in post-vote surveys that their vote should be understood as ‘a symbolic sign’.³⁷

³⁴ Bovay and Broquet, *Religionslandschaft in der Schweiz* (Swiss Federal Statistical Office, 2004), available at: <http://www.bfs.admin.ch/bfs/portal/de/index/themen/01/22/publ.html?publicationID=1614>, at 49 [last accessed 12 September 2011].

³⁵ See Kriesi and Trechsel, *The Politics of Switzerland: Continuity and Change in a Consensus Democracy* (Cambridge: Cambridge University Press, 2008) at 92-97.

³⁶ Linder, Zürcher, and Bolliger, *Gespaltene Schweiz – geeinte Schweiz: Gesellschaftliche Spaltungen und Konkordanz bei den Volksabstimmungen seit 1874* (Baden: hier + jetzt, 2008) 211-2.

³⁷ Senti, ‘Moderate Mitte gegen Minarette’, *Neue Zürcher Zeitung*, 26 January 2010.

The recent rise of popular initiatives that violate the rights of minority groups raises the question as to whether there are, or should be, any limitations on direct democratic instruments. Are there any limits to the will of the people?

3 Current limitations on popular initiatives

Under current law, a popular initiative must only meet minimal requirements to be put to the vote. Prior to the start of the collection of signatures, the signature sheets must be reviewed by the Federal Chancellery to ensure that they contain certain basic information.³⁸ Once the required 100,000 signatures have been collected and submitted (which must occur within 18 months),³⁹ the Federal Assembly, based on a report of the Federal Council, reviews the initiative for its compliance with the following three elements listed in Article 139(3) of the Federal Constitution. First, the initiative must take the form of either a general proposal or a specific draft, but not a hybrid between the two. Second, it must observe the single-subject rule. Third, it must not conflict with peremptory norms of international law. A fourth, unwritten, requirement is that it must be practically feasible for the initiative to be implemented.⁴⁰

The central requirement for the present context is the third one. While some authors argue that ‘peremptory norms of international law’ is a reference to the corpus of law that is internationally recognised as constituting *ius cogens*,⁴¹ others think that it is an autonomous term of Swiss constitutional law that can be interpreted more broadly to also include fundamental norms of international law that have not (yet) attained *ius cogens* status.⁴² The Federal Assembly and the Federal Council have adopted a narrow definition of the term, limiting it to those rules that are of such fundamental importance to the international community that they must be regarded as binding upon any state that respects the rule of law and that can thus never be derogated from.⁴³ These rules are said to include the

³⁸ Articles 68-69 Federal Act on Political Rights.

³⁹ Article 139(1) Federal Constitution.

⁴⁰ See Biaggini, *Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft* (Zürich: Orell Füssli, 2007) at 632.

⁴¹ For example, Hangartner and Kley, *Die demokratischen Rechte in Bund und Kantonen der Schweizerischen Eidgenossenschaft* (Zürich: Schulthess, 2000) at 227-8.

⁴² For example, Thürer, ‘Verfassungsrecht und Völkerrecht’, in Thürer, Aubert, and Müller (eds), *Verfassungsrecht der Schweiz* (Zürich: Schulthess, 2001) 179 at 184-5.

⁴³ For an overview see Baumann, ‘Völkerrechtliche Schranken der Verfassungsrevision’ (2007) *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 181 at 190-206.

prohibitions of genocide, slavery, and torture, the principle of non-refoulement, the core guarantees of international humanitarian law, and the non-derogable guarantees of the ECHR and the ICCPR.⁴⁴ Since international responsibility for violation of this body of international law simply cannot be evaded, it makes good sense that norms of domestic law that are incompatible with it should never come into force, regardless of their democratic legitimacy. Given its narrow definition, however, this validity requirement does not present a major obstacle. Only one popular initiative has ever been declared invalid for violating a peremptory norm of international law. In 1996, the Federal Assembly adjudged an initiative demanding the immediate expulsion of all asylum-seekers who have entered the country illegally to be incompatible with the principle of non-refoulement.⁴⁵ Neither in the case of the minarets initiative nor in that of the expulsion initiative did the federal authorities think that there was a violation of peremptory norms of international law, arguing in the former case that the freedom to exercise one's religion and the prohibition of discrimination do not form part of *ius cogens*,⁴⁶ and in the latter that the proposal can be implemented in a way that respects the principle of non-refoulement.⁴⁷ In fact, all sorts of proposals that clearly violate human rights would be compatible with this requirement, from a ban on smiling in public to denying red-haired people access to public education.

If one of the four requirements mentioned above is not satisfied, the Federal Assembly declares the popular initiative invalid. Otherwise, it must put it to the vote of the people and the cantons. The decision of the Assembly cannot be challenged before the courts (or any other body).

If the initiative is approved by a majority of voters and cantons, the proposed constitutional norm enters into force.⁴⁸ In case of the sort of initiatives at issue here, this leads to a conflict between the new constitutional norm and, first, other norms of constitutional law (namely those guaranteeing fundamental rights) and, second, international human rights treaties, most importantly the ECHR. As far as the first conflict is concerned, the Swiss Federal Constitution does not provide for a hierarchy between its different norms as, for example,

⁴⁴ For example, supra n 7 at 8962; and Botschaft über eine neue Bundesverfassung, Bundesblatt 1997 I 1 at 362.

⁴⁵ Botschaft über die Volksinitiativen "für eine vernünftige Asylpolitik" und "gegen die illegale Einwanderung", Bundesblatt 1994 III 1486 at 1499; and Bundesbeschluss über die Volksinitiative "für eine vernünftige Asylpolitik", Bundesblatt 1996 I 1355.

⁴⁶ Botschaft zur Volksinitiative "Gegen den Bau von Minaretten", Bundesblatt 2008 7603 at 7609-12.

⁴⁷ Supra n 4 at 5102-3.

⁴⁸ Article 195 Federal Constitution.

the German Basic Law does.⁴⁹ Therefore, it is relatively uncontentious that, in accordance with the general rules of interpretation, the newer and more specific norm (for example the minarets ban) prevails over the older and more general guarantees of fundamental rights (for example the guarantees of freedom of religion and freedom from discrimination).⁵⁰ The second conflict, however, inevitably leads to a dilemma: either Switzerland violates its obligations under international human rights law or a constitutional norm approved in a democratic process is not given effect.

Where, as is often the case, constitutional norms are implemented through enactment of legislation, Parliament will typically try to solve the dilemma by coming up with legislative measures that address the main concerns behind the popular initiative but are still within the confines of international law. The result may then be a compromise solution that is based on a very broad interpretation of the wording of the new constitutional norm and may not fully reflect the intention of the authors of the initiative. This was how the initiative for the lifelong detention of sexual and violent offenders was eventually dealt with.⁵¹ In the case of the recent initiative for the expulsion of foreign criminals, a commission was established which is currently trying to draw up implementing measures that would reflect the different positions and comply with international law as far as this is possible.⁵²

Where, as with the minarets ban, the constitutional norm is specific enough to be directly applicable, courts or other public authorities that are supposed to apply the norm may be confronted with the same dilemma. For example, if a planning application for a minaret was submitted, the new Article 72(3) of the Federal Constitution (providing that ‘the construction of minarets is prohibited’) would require them to reject it, whereas Article 9 of the ECHR (the guarantee of the freedom of religion) would seem to oblige them to grant it. Courts confronted with such a dilemma will first of all attempt to interpret the constitutional norm in a manner that is compatible with international law. In that regard, Swiss courts are in a comparable position to UK courts, which are obliged under section 3 of the Human

⁴⁹ See Article 79(3) Basic Law.

⁵⁰ See, for example, Kiener and Krüsi, ‘Bedeutungswandel des Rechtsstaats und Folgen für die (direkte) Demokratie am Beispiel völkerrechtswidriger Volksinitiativen’ (2009) *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 237 at 247-8.

⁵¹ See Baumann, *supra* n 43 at 209-10.

⁵² See Bundesamt für Migration, ‘Arbeitsgruppe zur Umsetzung der Ausschaffungsinitiative: Zwischenstand’, 5 May 2011.

Rights Act to interpret domestic law in a way which is compatible with the ECHR in so far as it is possible to do so.

In some cases, however, including most probably that of the minarets ban, an interpretation in conformity with international law is simply impossible. The Swiss Federal Constitution does not contain any explicit rules as to how the conflict is then to be solved, that is, whether the constitutional norm or international law prevails. Although Article 5(4) provides that ‘the Confederation ... shall respect international law’, it does not explain what body of law prevails in case of conflict.⁵³ Similarly, Article 190 obliges courts to apply international law (as well as federal acts) but does not establish a hierarchical relationship between the different categories of norms. The Federal Court (the highest Swiss court) has developed a rather substantial jurisprudence on the relationship between international law and federal *acts*. According to this jurisprudence, an act may only prevail over international law if it was passed after the respective international norm had come into force and if it was Parliament’s intention to pass an act that violates international law;⁵⁴ the ECHR is afforded a special status and prevails even over this type of federal acts.⁵⁵ In contrast, as far as the relationship between international law and the Federal *Constitution* is concerned, the Federal Court has so far merely touched upon the respective legal issues, without addressing them in any detail.⁵⁶

In legal doctrine, views on how the conflict is to be solved are divided. A first group of scholars argues that international law should prevail over conflicting norms of the Federal Constitution. They base their argument mainly on Article 190 of the Federal Constitution, which requires courts to apply international law but fails to mention constitutional law. Based on a literal interpretation of this provision they conclude that, in case of a conflict, courts are bound to apply international law and, thus, prevented from applying the conflicting constitutional norm.⁵⁷ The view that international law should take precedence is especially compelling as far as the ECHR is concerned. The ECHR is distinct from other

⁵³ See Reich, ‘Direkte Demokratie und völkerrechtliche Verpflichtungen im Konflikt’ (2008) 68 *Heidelberg Journal of International Law* 979 at 994.

⁵⁴ BGE (Decisions of the Federal Court) 99 Ib 39 at 43-5.

⁵⁵ BGE 125 II 417 at 424-6.

⁵⁶ See BGE 133 V 233 at 237 and BGE 133 II 450 at 460, both of which suggest that international law should prevail over constitutional guarantees of fundamental rights.

⁵⁷ For example, Künzli, ‘Demokratische Partizipationsrechte bei neuen Formen der Begründung und bei der Auflösung völkerrechtlicher Verpflichtungen’ (2009) *Zeitschrift für Schweizerisches Recht* 47 at 70-3; Kiener and Krüsi, *supra* n 50 at 250-2; Müller, ‘Wie wird sich das Bundesgericht mit dem Minarettverbot der BV auseinandersetzen?’, *Jusletter*, 1 March 2010, at paras 17-19.

international instruments in that, with the European Court of Human Rights, it has an authoritative and respected judicial control mechanism. Since a finding of a violation of the ECHR by the European Court constitutes a ground to revise the preceding decision of the Federal Court,⁵⁸ the latter arguably has a duty to prevent findings of violations by the Strasbourg Court. It was for this reason that, as explained above, the Federal Court decided to give priority to the ECHR over any type of federal *acts*. It would only be consistent to extend this practice to *constitutional norms*.⁵⁹ However, in view of the unclear legal situation, it is doubtful whether the courts would in fact be willing not to give effect to a constitutional norm, given the strong democratic legitimacy such norms enjoy.

A second group of scholars – probably the majority – holds that newer constitutional law should prevail over conflicting international law. They argue that the Federal Constitution refers to peremptory norms of international law as the sole limitation on popular initiatives, thus allowing popular votes on proposals that violate other norms of international law. It would, they suggest, make a mockery of the democratic process if a constitutional norm approved by the people was not implemented because courts are prevented from applying it.⁶⁰ According to some authors, a constitutional norm should, at the very least, then prevail over international law if, as is the case with federal acts, it was the intention of the body passing it to violate international law.⁶¹ This position, however, raises the complex question as to how to establish what the intention of voters approving the respective constitutional norm was.

The Federal Council has sided with this second group of scholars. In a report on the relationship between international and domestic law of 2010, it states that a directly applicable and newer constitutional norm, such as the minarets ban, should prevail over older international law.⁶² Where a popular initiative was clearly intended to violate international law, its approval by voters and cantons must, according to the Federal Council,

⁵⁸ Article 122 Federal Act on the Federal Court.

⁵⁹ For example, Biaggini, ‘Die schweizerische direkte Demokratie und das Völkerrecht – Gedanken aus Anlass der Volksabstimmung über die Volksinitiative “Gegen den Bau von Minaretten”’ (2010) 65 *Zeitschrift für öffentliches Recht* 325 at 337; and Auer and Tornay, ‘Aux limites de la souveraineté du constituant: l’initiative “Pour des naturalisations démocratiques”’ (2007) *Aktuelle Juristische Praxis* 740 at 746.

⁶⁰ For example, Baumann, ‘Die Umsetzung völkerrechtswidriger Volksinitiativen’ (2010) *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 242 at 260-3; and Hangartner, ‘Das Verhältnis von Völkerrecht und Landesrecht’ (1998) 94 *Schweizerische Juristen-Zeitung* 201 at 204-6.

⁶¹ For an overview see Nobs, *Volksinitiative und Völkerrecht* (Zürich/St. Gallen: Dike, 2006) at 360, 362-6.

⁶² Bericht des Bundesrates über das Verhältnis von Völkerrecht und Landesrecht, 5 March 2010, Bundesblatt 2010, 2263 at 2310, 2323, 2331.

be interpreted as a mandate to withdraw from the respective international obligations.⁶³ Again, this raises the difficult problem of establishing voters' intentions. For instance, in the case of the minarets ban, the federal authorities had recommended voters reject the initiative because it violated human rights, in particular the freedom of religion.⁶⁴ Most proponents, however, had argued that the ban would not amount to an interference with this freedom as the construction of minarets was not covered by it.⁶⁵ Therefore, it would be difficult to argue that the majority of voters intended, or even only accepted, a violation of the ECHR. Moreover, as the Federal Council also acknowledges, with regard to certain international treaties, including the ECHR, political reasons make withdrawal an unrealistic option.⁶⁶ With other treaties, withdrawal may even be legally impossible. The ICCPR, for example, does not contain a denunciation clause, and the UN Human Rights Committee has explicitly stated that states parties are not allowed to withdraw from it.⁶⁷

Accordingly, there is now broad consensus that there is a need for constitutional reform to prevent these kinds of conflict between popular initiatives and human rights from arising in the first place or, at the very least, to provide clearer rules as to how they should be resolved.

4 Proposals for reforming the current system

The conflict between recent popular initiatives and human rights guarantees has not only led to a major debate in Swiss legal scholarship but has also triggered different political initiatives, including even the foundation of a new umbrella organisation that 'aims to strengthen the interaction between human rights and direct democracy'.⁶⁸ Legal scholars, members of Parliament, and various organisations have put forth numerous proposals for reform. Perhaps most significantly, in March 2011 the Federal Council, upon request by Parliament, published a follow-up report to its 2010 report on the relationship between international and domestic law, setting out several specific suggestions for amending the

⁶³ Ibid. at 2317. See also *ibid.* at 2323, 2328-9.

⁶⁴ *Supra* n 46 at 7630-48.

⁶⁵ For example, *Votum Hutter-Hutter*, Amtliches Bulletin NR 2009 I at 90; and *Votum Wobmann*, *ibid.* at 95.

⁶⁶ *Supra* n 62 at 2317, 2323, 2328-9.

⁶⁷ Human Rights Committee, General Comment No 26: Continuity of obligations, 8 December 1997, CCPR/C/21/Rev.1/Add.8/Rev.1; 5 IHRR 301 (1998).

⁶⁸ See the website of the organisation, the 'Solothurner Landhausversammlung zur Stärkung der Menschenrechte und der Direkten Demokratie' at: www.landhausversammlung.ch [last accessed 12 September 2011].

legal framework for popular initiatives.⁶⁹ Given space constraints, this Section provides merely an overview of the most important and most concrete reform proposals put forward so far.

One set of proposed changes relates to the preliminary review of popular initiatives *prior* to the start of the collection of signatures, which is currently restricted to a purely formal review of the signature sheets by the Federal Chancellery. It has been suggested that initiatives should be reviewed also for their compliance with the four substantive requirements outlined in the previous Section – and possibly further requirements such as compliance with the ECHR – at this earlier point in time, as there is then significantly less political pressure not to invalidate an initiative than once 100,000 persons have expressed their support.⁷⁰ As a further change, a member of Parliament proposed that this earlier review of the validity of popular initiatives should be undertaken by a judicial body to ensure it is based on legal rather than political considerations.⁷¹ However, in April 2011 Parliament voted against this proposed extension of the preliminary review.⁷² A more modest amendment has been suggested by the Federal Council in its follow-up report. According to the Federal Council, the preliminary review should be extended to include an assessment, carried out by a department of the government, of the conformity of popular initiatives with international law. However, this assessment would not be binding, meaning that the initiative would not have to be withdrawn or amended if it is found to violate international law and that the Federal Assembly would still be free to come to a different conclusion in its decision on the validity of the initiative. The purpose of this preliminary assessment would merely be to inform the authors of the initiative about possible conflicts with international law and thus enable them to amend its text. In addition, a ‘warning sign’ would be added to the signature sheets, informing potential signatories as to whether the initiative violates *ius cogens* or other norms of international law.⁷³ This, the Federal Council hopes, would minimise the risk of initiatives being submitted that violate international law.⁷⁴

⁶⁹ Zusatzbericht des Bundesrates zu seinem Bericht vom 5. März 2010 über das Verhältnis von Völkerrecht und Landesrecht, 31 March 2011, Bundesblatt 2011 3613.

⁷⁰ Griffel, ‘Vom Umgang mit verfassungswidrigen Volksinitiativen’, *Neue Zürcher Zeitung*, 9 December 2009.

⁷¹ Parlamentarische Initiative 09.521 (Moret), ‘Gültigkeit von Volksinitiativen. Juristischer Entscheid vor Beginn der Unterschriftensammlung’, 11 December 2009.

⁷² Amtliches Bulletin NR 2011 at 698.

⁷³ *Supra* n 69 at 3632-40.

⁷⁴ *Ibid.* at 3632 and 3637.

A second set of reform proposals relates to the review of popular initiatives by the Federal Assembly *after* submission of the required number of signatures. Some legal scholars as well as a number of parliamentarians advocate *procedural* changes to address the problem that under current law the decision on the validity of popular initiatives – a decision that should be based on legal considerations – is the exclusive domain of Parliament, a political body. They suggest that this competence should be transferred to the Federal Court⁷⁵ or some newly created judicial body;⁷⁶ or that it should be possible to bring a legal challenge against the Federal Assembly's decision;⁷⁷ or, at the very least, that the Federal Assembly should be able to request a legal opinion from the Federal Court.⁷⁸ Others have proposed an extension of the *substantive* requirements popular initiatives must meet. Thus, an initiative could not only be declared invalid if it violates peremptory norms of international law but also if it conflicts with 'norms of international law that are of vital importance to Switzerland',⁷⁹ international human rights guarantees (in particular those contained in the ECHR),⁸⁰ 'rights forming part of the European public order',⁸¹ or a number of international norms that would be explicitly listed.⁸² Also in this regard the Federal Council, while taking up some of these ideas, has formulated a much more modest proposal for reform. It suggests adding a new validity requirement according to which popular initiatives must respect 'the core (*Kerngehalt*) of fundamental rights', a term of art of Swiss constitutional law that describes those aspects of fundamental rights that enjoy absolute protection and can thus never be restricted.⁸³ Thus, an initiative could be declared invalid if it violates the prohibition of the death penalty (belonging to the core of the right to life), the right not to be forced to perform a religious act (belonging to the core of the freedom of religion), or the prohibition of forced marriage (belonging to the core of the right to marriage).

⁷⁵ Staatspolitische Kommission des Nationalrates, 'Medienmitteilung: Gültigkeit von Volksinitiativen: Kommission will Bundesgericht einbeziehen', 21 August 2008; and Dutoit, Berti, Isler, Pichonnaz, Thürer, and Walter, 'Préface: Ordre populaire v. démocratie' (2011) 130 *Zeitschrift für Schweizerisches Recht* 3.

⁷⁶ Keller, Lanter, and Fischer, 'Volksinitiativen und Völkerrecht: die Zeit ist reif für eine Verfassungsänderung' (2008) *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 121 at 151.

⁷⁷ Nay, 'Vorschlag für eine Ergänzung der Bundesverfassung als Diskussionsgrundlage', 11 October 2010, available at: http://www.landhausversammlung.ch/v01/images/stories/Vorschlag_Giusep_Nay_FassungAm11.Oktober.pdf [last accessed 12 September 2011].

⁷⁸ See supra n 62 at 2336-7.

⁷⁹ Keller, Lanter, and Fischer, supra n 76 at 149.

⁸⁰ Parlamentarische Initiative 07.477 (Vischer), 'Gültigkeit von Volksinitiativen', 5 October 2007.

⁸¹ Hertig Randall, 'L'internationalisation de la juridiction constitutionnelle: défis et perspectives' (2010) 129 *Zeitschrift für Schweizerisches Recht* 221 at 355.

⁸² See supra n 62 at 2333-4.

⁸³ Supra n 69 at 3642-6.

A third set of proposals is primarily aimed at increasing the transparency of the political debate leading up to popular votes on problematic initiatives and providing clearer guidelines for the implementation of such initiatives by Parliament. Thus, it has been suggested that if the Federal Assembly comes to the conclusion that it would be impossible to implement an initiative in its original form in a way that is compatible with international law, it should issue an opinion to that effect, together with a recommendation to voters to reject the initiative. If the initiative nonetheless gains a majority in the popular vote, the Federal Assembly would have to draft a constitutional norm that comes as closely as possible to the original text of the initiative but is still compatible with international law. This final proposal would then need to be approved by the majority of voters and cantons.⁸⁴

Finally, a number of proposals would address the problem at the last possible stage, once a popular initiative has been approved and the respective constitutional amendment has entered into force. They would do so by addressing the current lack of explicit rules instructing courts as to how they should solve the conflict between the new constitutional norm and international law. Thus, one possibility would be to add a provision to the Federal Constitution that essentially codifies the rules developed by the Federal Court for the relationship between international law and federal acts, extending them to constitutional norms. Accordingly, a (newer) constitutional norm would prevail over (older) international law provided that, first, voters and the cantons approved it knowing that it violates a norm of international law and, second, that norm of international law is not a guarantee of the ECHR.⁸⁵ However, the Federal Council rejected this proposal in its follow-up report, arguing that it would often be difficult to establish whether there was an intention to deviate from international law and that, instead of having a strict regulation as to which type of norm prevails, it is preferable to leave it to the courts to weigh the different interests at stake in a given case.⁸⁶ Another option would be to introduce a provision into the Federal Constitution which states that, in case of a conflict, constitutional guarantees of fundamental rights prevail over any other norms, whether other constitutional norms or norms contained

⁸⁴ Ehrenzeller, 'Garantie von Rechtsstaat und öffentlichem Diskurs', *Neue Zürcher Zeitung*, 16 September 2010; and Parlamentarische Initiative 10.494 (Amherd), 'Volksinitiativen und Völkerrecht', 1 October 2010 (withdrawn on 20 May 2011).

⁸⁵ See *supra* n 69 at 3660.

⁸⁶ *Ibid.* at 3660-1.

in a federal act.⁸⁷ Such a provision would create a hierarchy within the constitution. As a consequence, for example, a court would be prevented from applying Article 72(3) of the Federal Constitution (the minarets ban) to the extent that it is incompatible with Article 15 (the freedom of religion), despite the fact that the former is the more recent and more specific norm. Since essentially all ECHR and ICCPR guarantees are covered by the fundamental rights catalogue of the Federal Constitution, such a solution would ensure that courts, at least indirectly, would also give effect to the most important international human rights guarantees in all cases.

5 Assessment of reform proposals

Given the Swiss system of ‘consensus democracy’, which tends to produce outcomes that strike a balance between differing political positions,⁸⁸ the prospects for the more radical proposals for reform are rather bleak. If any reforms will be realised in the – perhaps not so near – future (the mills of Swiss democracy grind slowly),⁸⁹ it seems most likely that they will be largely along the lines of the very limited changes suggested by the Federal Council. This would be an unsatisfactory result, since, as the Federal Council admits itself, these changes will not provide a solution to all the problems arising from popular initiatives that violate human rights.⁹⁰ In fact, it will be argued here, they would hardly make any difference at all to the present situation.

The Federal Council’s suggestion to extend the preliminary review of popular initiatives to include an assessment of their conformity with international law and to add a respective ‘warning sign’ on signature sheets is to be welcomed. It is important that citizens are able to make an informed decision as to whether or not to sign and, later, vote for or against a popular initiative. In that sense, this new requirement would fulfil a similar role to that served by statements of compatibility according to section 19 of the British Human Rights Act: to inform the voting body about potential conflicts with international law (or, in the case of the United Kingdom, the ECHR), which the proposed measure may entail. However, the Federal Council’s claim that this extended preliminary review would contribute to a

⁸⁷ Burri, Grossenbacher, Schinzel, and Suter, *Volksinitiativen: Bausatz für eine Reform – foraus-Diskussionspapier No 7* at 26, 45-52, available at: http://www.foraus.ch/media/medialibrary/2011/05/Volksinitiativen_Bausatz_fuer_eine_Reform.pdf [last accessed 12 September 2011].

⁸⁸ Linder and Steffen, ‘Political Culture’, in Klöti et al (eds), *supra* n 8 at 15, 26-8.

⁸⁹ Kriesi and Trechsel, *supra* n 35 at 115.

⁹⁰ *Supra* n 69 at 3637, 3652-3, and 3661.

reduction of the number of popular initiatives that violate international law seems overly optimistic.⁹¹ Recent empirical evidence suggests that the vast majority of Swiss citizens do not care much about the legal implications of the popular initiatives they vote on.⁹² In fact, one may wonder if the ‘warning sign’ on signature sheets may not turn out to be counterproductive. In the current political climate where everything coming from outside the Swiss borders is looked upon with much distrust, the popularity of a proposal may actually increase if the tag ‘Attention, violates international law!’ is attached to it. This will be all the more so if it is the government, rather than some independent body, which attaches that tag.

As far as the validity review of popular initiatives by the Federal Assembly is concerned, the procedural changes that have been suggested seem the most promising ones in terms of effectiveness. Since Parliament as a political body will inevitably be reluctant to declare an initiative invalid once 100,000 signatures have been collected, involvement of a judicial body in this decision would undoubtedly contribute to a more stringent review of initiatives. However, political support for such a change is minimal⁹³ and the Federal Council did not even address the possibility of such a reform in its follow-up report. As to the creation of new substantive requirements that popular initiatives would have to meet, most of the proposed requirements (such as conformity with ‘norms of international law that are of vital importance to Switzerland’) seem too vague to be readily applicable in practice. The requirement suggested by the Federal Council, respect of ‘the core of fundamental rights’, in turn, is far too limited to have any significant effect. Not a single one of the recent problematic initiatives that gave rise to the current debate would have failed to meet this modest threshold. In fact, it is difficult to think of any measure with realistic prospects of being proposed in the near future that would violate ‘the core of a fundamental right’.⁹⁴

In any event, the creation of new substantive hurdles for popular initiatives is not, it is submitted, an appropriate means to prevent conflicts with human rights guarantees. The

⁹¹ Supra n 69 at 3632, 3637.

⁹² Christmann, ‘Do Voters Care about Rights? Protection of Rights and the Rule of Law in a (Semi-)Direct Democracy’, paper presented at the ECPR General Conference, 2009, available at: http://www.annachristmann.org/resources/ECPR+Potsdam_AChristmann_Do+voters+care+about+rights.pdf [last accessed 12 September 2011].

⁹³ See text accompanying n 71-2.

⁹⁴ A recent initiative to reintroduce the death penalty for sexually-motivated murders was withdrawn before the start of collection of signatures. ‘Todesstrafe-Initiative vom Komitee zurückgezogen’, *Neue Zürcher Zeitung*, 26 August 2010.

right to launch a popular initiative is a political right of central importance in the Swiss system of (semi-)direct democracy. Any restrictions imposed should be kept to a minimum. Within certain, very narrowly defined limits, citizens should be able *to propose* what they want, even if the proposal is radical or only intended to ‘send a signal’ – just as, in a representative democracy, there are generally no limits on what can be voted on in parliament.⁹⁵ The extent to which a proposed measure is compatible with already existing norms and can thus *be implemented* is, however, a different issue. Whether a constitutional amendment entails a violation of human rights can be better assessed *ex post*, by reviewing individual cases in which the respective measure is applied, rather than through an *ex ante* review of an abstract proposal. Especially with proposals that are more complex than, for example, the minarets ban – and most measures proposed by way of popular initiatives are more complex – it may be very difficult to predict whether or not they will lead to a conflict with human rights guarantees. Making the difficult distinction between a permissible interference with, and an impermissible violation of, human rights is a determination that should be left to the process of judicial review.⁹⁶

It is thus at the final stage, the stage where a new constitutional norm is applied and the respective measures are challenged before the courts, that the tension between direct democracy and human rights should be addressed primarily. It is all the more unfortunate that the Federal Council has not formulated any proposals for reform in this regard. As explained above, under current law, the courts would have to give precedence to a new constitutional norm over older constitutional guarantees of fundamental rights, while it is unclear how they should deal with a conflict between a new constitutional norm and older international law, including international guarantees of human rights.

The suggestion to create a new rule according to which, in case of a conflict, guarantees of fundamental rights prevail over any other norms is a sensible way forward. (Although it must be acknowledged that, at a theoretical level, it may not be easy to come up with a coherent justification for giving fundamental rights priority over other constitutional norms.)⁹⁷ It would then be for courts to decide whether a given measure based on the new

⁹⁵ See Gordon III and Magleby, ‘Pre-Election Judicial Review of Initiatives and Referendums’ (1989) 64 *Notre Dame Law Review* 298 at 312.

⁹⁶ See Auer, ‘Die Demokratie steht in einem Lernprozess’, *Neue Zürcher Zeitung*, 4 November 2010.

⁹⁷ See Seiler, ‘Verfassungsgerichtsbarkeit zwischen Verfassungsrecht, Richterrecht und Politik’ (2010) 129 *Zeitschrift für Schweizerisches Recht* 381 at 521-3.

constitutional norm amounts to an interference with fundamental rights and, if so, whether it is permissible because it pursues a legitimate aim in a proportionate manner. To make these kinds of decisions is the proper domain of the courts, and they have a rich experience in doing so. Given the lack of safeguards protecting the interests of minorities in direct democratic decision-making pointed out above, it can even be argued that the justification for judicial review to ensure conformity with human rights is stronger in the case of measures adopted by popular vote than those adopted by parliament.⁹⁸

As a consequence, measures that are not supported by a weighty public interest (for example, because their aim is merely symbolic) or impose a disproportionate burden on individuals (for example, because they amount to a serious interference with a fundamental freedom such as freedom of religion) would be invalidated at the level of application. The disadvantage of this would be that there will be popular votes on proposals that may then not be (fully) implemented. However, this is not a serious problem. If voters know that human rights guarantees will take precedence once it comes to implementation of a proposal and a potential lack of conformity with such guarantees is highlighted before the vote (for example, by way of the suggested preliminary review and respective ‘warning signs’), it can hardly be claimed that voters are misled and the democratic process undermined.⁹⁹ In fact, it is likely that public debates leading up to popular votes would benefit by becoming more focused on the questions of the legitimate aim and the proportionality of a proposed measure than is currently the case, which would be a welcome development improving the understanding of human rights within the general public.

Under current law, courts do not have the power to review federal acts for their constitutionality.¹⁰⁰ As it would be illogical to authorise courts to review constitutional, but not statutory, norms for their conformity with fundamental rights, it makes good sense that according to the proposed change also federal acts could be reviewed. However, this creation of a form of constitutional review at the federal level, although limited to a review for conformity with fundamental rights, would be likely to be viewed by many as amounting to a radical change of the Swiss constitutional landscape – notwithstanding that, as explained above, the Federal Court already now gives precedence to ECHR guarantees over

⁹⁸ Eule, ‘Judicial Review of Direct Democracy’ (1990) 99 *Yale Law Journal* 1503.

⁹⁹ See also Kiener and Krüsi, *supra* n 50 at 253.

¹⁰⁰ Article 190 Federal Constitution.

federal acts. It is doubtful that there is sufficient political support for such a change. At the time of writing, the Federal Assembly is debating several proposals for the introduction of a form of constitutional review at the federal level, although not in direct relation to the issues discussed in this article or in the exact form presented above.¹⁰¹ According to press reports, the proposals are unlikely to gain a majority.¹⁰²

Conclusion

In Switzerland, the relationship between direct democracy and human rights has traditionally been idealised as one of congruence and mutual reinforcement. The great constitutional lawyer Zaccaria Giacometti, for example, writing more than 50 years ago, argued that it is an empirical fact that Swiss democracy functions as ‘the guardian of human rights’: at least if it is ‘mature’ enough for democracy, he was convinced, the people will always decide in favour of human rights.¹⁰³ However, it has become increasingly clear in recent years that there may be a real tension between direct democracy and human rights, especially in a political climate where direct democratic proposals targeting unpopular minorities may serve as powerful instruments of political public relations. Direct democracy may be a good thing for those minorities that have a certain degree of political leverage, allowing them to make effective use of direct democratic instruments themselves, and that are perceived as well-integrated into society, but it tends to have a negative impact on those groups that are regarded as alien, as not being a proper part of society. This is not to say that representative democracies are completely immune from this problem. A recent example illustrating that they are not is the UK Parliament’s decision of February 2011 to uphold the blanket ban preventing prisoners from voting,¹⁰⁴ which is in clear contravention of Article 3 of Protocol No 1 to the ECHR,¹⁰⁵ on the basis that prisoners, by committing a crime, have ‘set themselves apart from society’.¹⁰⁶ It is an interesting parallel to the vote on the minarets

¹⁰¹ Parlamentarische Initiative 05.445 (Studer), ‘Verfassungsgerichtsbarkeit’, 7 October 2005; and Parlamentarische Initiative 07.476 (Müller-Hemmi), ‘Bundesverfassung massgebend für rechtsanwendende Behörden’, 5 October 2007.

¹⁰² Schoch, ‘Wenig Chancen für Ausbau der Verfassungsgerichtsbarkeit’, *Neue Zürcher Zeitung*, 20 May 2011.

¹⁰³ Giacometti, ‘Die Demokratie als Hüterin der Menschenrechte’, in Kölz (ed.), *Zaccaria Giacometti (1893 – 1970): Ausgewählte Schriften* (Zürich: Schulthess Verlag, 1994) 5.

¹⁰⁴ Watt and Travis, ‘MPs decide to keep blanket ban on prisoners’ vote’, *The Guardian*, 10 February 2011.

¹⁰⁵ See *Hirst v. United Kingdom (No. 2)* 2005-IX; 42 EHRR 849.

¹⁰⁶ Hansard, HC Deb, Vol 523, col 534 (10 February 2011).

ban in Switzerland that MPs voting in favour of the ban intended to thereby ‘send a signal’ (to constituents and the European Court of Human Rights).¹⁰⁷

The legal framework currently in place in Switzerland does not provide sufficient protection against popular initiatives that violate human rights – or, at least, it does not state clearly enough that it would do so. The Federal Constitution should be amended to make it explicit that, when it comes to the implementation of a constitutional norm approved in a popular vote, courts are not bound to apply that norm if, in the case at hand, this would lead to a violation of fundamental rights. This can hardly be characterised as a serious limitation on direct democracy. On the contrary: human rights are the lifeblood of democracy and their effective protection is a prerequisite for its very existence.¹⁰⁸

In any event, the popular sovereign would not necessarily be prevented from restricting human rights if it really wanted to. However, instead of by singling out unpopular minorities, it would have to do so in a consistent manner – namely, by amending the fundamental rights catalogue of the Federal Constitution and, possibly, instructing the government to withdraw from relevant international human rights treaties. For example, if the majority of voters does not want to fully protect the freedom to manifest one’s religion, the scope of the respective constitutional guarantee should be redefined accordingly (for example, by making it clear that the construction of religious buildings is not covered by it) and Switzerland should withdraw, where this is possible, from treaties guaranteeing the freedom of religion. Similarly, if the UK Parliament does not want the right to vote to apply to everyone, it is free to decide that Protocol No 1 to the ECHR should be denounced. Given the far-reaching consequences of this alternative (such as reduced human rights protection also for those in the majority and isolation from the international and European communities), one can be reasonably confident that it will appear too unattractive to gather much support. This is all the more true considering that votes such as that on the minarets ban or that on the voting ban for prisoners are often used merely as an opportunity to take a symbolic stand. There can be no harm, then, in courts refusing to give effect to such symbolic measures as far as they conflict with human rights.

¹⁰⁷ Hansard, HC Deb Vol 523, col 506 (10 February 2011).

¹⁰⁸ Giacometti, *supra* n 103 at 6.